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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL ALONZO SIMMONS, Defendant and Appellant.	E045818 (Super.Ct.No. FWV701933) OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond P. Van Stockum, Judge. Affirmed with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Samuel Alonzo Simmons appeals after he was convicted in a jury trial of burglary, grand theft, and using a counterfeit access card. He contends his conviction of grand theft must be reduced to misdemeanor petty theft because of an error in the verdict form. He also points out that the court erred in pronouncing his sentence. We affirm the judgment and order the record corrected to reflect a lawful sentence.

FACTUAL AND PROCEDURAL HISTORY

On August 11, 2007, a woman went into a Target store and attempted to purchase expensive electronic items with stolen credit cards. The transactions were declined. The woman left the store and was traced to a white van. A large man was in the driver's seat of the van. The woman entered the van, and the van drove away.

The next day, a store security officer was notified that the same white van had parked outside the store. The security officer searched through the store aisles and found a woman, Ivy Jackson, who had come into the store from the van attempting to purchase items at the electronics counter.

Jackson's transactions were recorded on videotape. At 6:46 p.m., Jackson bought two prepaid telephone cards for a total of $39.98, plus a gift card of $200. At 6:52 p.m., Jackson attempted to buy a video game system, but the credit card she was using was declined. She took out another credit card and used it to purchase a second $200 gift card. At 6:55 p.m., Jackson bought a third $200 gift card.

Jackson left the store and went to the back of the white van. Defendant was waiting in the driver's seat. A video surveillance tape showed defendant take a white envelope from the van's roof lining. He took a card from the envelope and gave it to Jackson. Jackson returned to the store. At 7:02 p.m., she used the new card defendant had just given her to purchase a video game system for $485.89. While Jackson was completing that transaction, the store security officer called the police. At 7:16 p.m., Jackson purchased more items using one of the $200 gift cards she had just purchased. The total of the gift card purchase was $73.16.

Jackson took her purchases and left the store. Just then, a marked police car was coming into the parking lot. When defendant saw the police car, he motioned Jackson away and began to back the van out of the parking space. The police arrested Jackson and defendant. Jackson had three access cards in her purse. Nine access cards were inside the envelope defendant had hidden in his van.

A month earlier, in July 2007, defendant had run a similar scheme at a different Target store. On one date, he and his companions went into the store and purchased items with fraudulent credit cards. Defendant purchased some compact discs for $64.91, and made a food purchase of $2.15. Two days later, defendant and his companions returned. While defendant waited in the car, a woman entered the store and purchased a video game system and prepaid telephone cards for a total of $749.44. Defendant was apprehended when store security called law enforcement. As a result of these acts, defendant pled guilty to two counts of Penal Code section 484e (fraudulent use of an

access card). He entered his guilty plea approximately 18 days before committing the current offenses.

At defendant's trial, the court instructed the jury, as to the grand theft charge, that "[i]f you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or simple grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that the defendant committed theft of property from the same owner or possessor on more than one [occasion]; the combined value of the property was over $400; and the defendant obtained the property as part of a single, overall plan or objective. [¶] If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts."

The verdict form returned by the jury, however, recited that the jury found defendant guilty of "grand theft of property of *four hundred dollars* or more[,] as charged in the information . . . ." (Italics added, capitalization omitted.)

At sentencing, the trial court denied probation, imposed sentence on count 1 (burglary) of six years, stayed; on count 2 (grand theft) imposed a sentence of six years, stayed; and on count 3 (fraudulent use of an access card) imposed a sentence of six years, stayed. The court also imposed an enhancement of one year for a prior prison term.

Defendant appeals.

DISCUSSION

A. The Grand Theft Conviction is Proper

Defendant first contends his conviction in count 2 of grand theft must be reduced to petty theft, because the verdict form given to the jury permitted conviction if the jury found he participated in stealing "four hundred dollars or more," rather than exceeding $400, as required under Penal Code section 487, subdivision (a). He argues that he was deprived of his right under the California Constitution to a unanimous jury verdict finding him guilty of the greater offense rather than the lesser, as well as his Sixth Amendment right to trial by jury.

The People respond that defendant has waived this claim by failing to raise it below. We agree. Defendant did and said nothing in response to the alleged error in the verdict form. As a general rule, "an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275-276.)

In any case, defendant's contention may be rejected on the merits. There is no realistic possibility that the jury could have been confused or misled by the jury verdict form. (See *Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316].) First, if defendant, as an accomplice, was guilty of any of the thefts, he was guilty of all. There is no theory by which some jurors might have found defendant guilty of stealing only $400 and no more. Second, the jury was properly instructed that it must find the value to be over $400. In addition, the prosecutor's argument set forth the proper

finding. There is no rational basis upon which a jury could find that, if defendant was guilty, he was guilty of the theft of $400 or less.

B. Defendant's Sentence Was Unauthorized and Must Be Corrected

Defendant points out that, when the trial court pronounced sentence, it erroneously stayed the sentence as to all three counts of which he was convicted. He requests a remand for resentencing, as the sentence recorded in the court's minute orders and abstract of judgment reflects a sentence that was not actually pronounced. Thus, for example, the minute order recites that the court imposed terms of six years each on counts 1 and 2, and three years on count 3, with count 1 designated as the principal count. The reporter's transcript contains no such designation of the principal count, nor a three-year term on count 3, in addition to indicating that the term on count 1 was stayed.

The People respond that the failure to impose a sentence and erroneously staying the execution of an entire sentence is an unauthorized sentence. (See *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

The People request correction of the judgment to lift the stay on count 1, and to correct the court's minute orders and the abstract of judgment to reflect the orally pronounced sentence of six years, not three years, on count 3. "When there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) Thus, the court's minute order and the abstract of judgment should be readily correctable to reflect the six-year sentence actually and orally

imposed. The People further urge that the sentence on count 3 should be imposed concurrently.

Defendant does not object to lifting the erroneous stay as to count 1, but argues that there is no authority suggesting that this court has the power to do so. We disagree. Where a sentence is unauthorized, "[a]ppellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott*, *supra*, 9 Cal.4th at p. 354.) In addition, defendant objects to designating the sentence on count 3 as a concurrent sentence, inasmuch as the court stayed the term on count 3. He argues that the stayed sentence on count 3, neither pronounced concurrent nor consecutive, was an authorized, lawful sentence, and therefore cannot be modified to make the term on count 3 concurrent to the other terms. (Citing *People v. Bozeman* (1984) 152 Cal.App.3d 504, 507.) When a sentence has not been expressly pronounced either consecutive or concurrent, however, it is to be served concurrently with the primary prison term (Pen. Code, § 669), so we fail to understand the ground of defendant's objection.

DISPOSITION

The convictions are affirmed. The matter is remanded with directions to the trial court to correct the sentence below, to designate count 1 as the principal count, to lift the stay on count 1, to impose terms of six years as to counts 2 and 3 (stayed), to reflect the imposition of a concurrent term on count 3, and the imposition of a one-year prior prison term enhancement. Once the sentence has been corrected, the court is directed to forward

a copy of the new abstract of judgment to the Department of Corrections and Rehabilitation.

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/s/ MILLER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ GAUT
J.